

**Review of Home Health Agencies under the Maryland
Certificate of Need Program**

**Working Paper for Discussion by the
Certificate of Need Task Force**

July 14, 2005

Statement of the Issue

Should the establishment of new home health agencies continue to require CON approval?

Summary of Public Comments

The Task Force received specific comments from nine organizations regarding regulation of the establishment of new home health agencies under the CON program. Those comments are summarized below:

Comments on behalf of **CareFirst** stated that hospice and home health services could be removed from the list of services to be reviewed with little or no harm to the public. CareFirst believes that adding capacity for hospice services neither increases hospice rates nor generates inappropriate hospice use and that home health agencies have negligible capital costs which cannot create excess capacity. Some of the staff and other resources now being devoted to review of these services could be freed up to address other issues.

Carroll Hospital Center supports maintaining the existing CON requirement for home care...The CON program ensures that providers demonstrate need for a particular service before putting it into place and overburdening the health care system in a particular area. However, CHC does feel that some improvements and enhancements could be made to the existing programs...

James A. Forsyth, Esquire recommended that home health be deregulated from CON review.

The **Garrett County Health Department** wrote in support of maintaining the existing CON review requirement for new or expanding home health agencies. Garrett County would not be able to compete with the already existing agencies in the county and the ability of neighboring states to cross state lines.

Gentiva Health Services commented in support of the current CON, if and only if, the CON is enforced, agencies are consistently surveyed and all regulations are fair and equitable. As a national provider, Gentiva currently provides services in states with and without CON programs. One of Gentiva's main concerns has been the significant influx of providers in other states without the CON. For instance, in the State of Florida, the CON was eliminated as of July 1, 2000. While the CON was in place, the State had approximately 20 new providers seeking a CON each year. Since the elimination of the CON, the number has increased five times to 120 a year. In real numbers, the state of Florida had, in May 2000, 330 certified home health agencies. In May 2005, the State

now has 658 certified home health agencies. This reflects similar results in other states without a CON. The increase in providers makes it very difficult to appropriately assure the quality of services being delivered to the patients needing care. There is also no oversight to ensure that the provider is a legitimate provider. At the same time, there is no review of access to services that shows the market needs additional providers....Gentiva supports the CON when regulations are implemented that are fair and equitable. In the past, there have been regulations that were implemented in October 2003 to state that if an agency were acquired, the purchaser may only acquire the authority to offer home health agency services in jurisdictions in which Commission records show that the facility being acquired either provided that service during fiscal year 2001 or was granted a certificate of need after that date and based on annual reports. While this regulation does not seem to have an immediate impact on a home health agency, it does immediately imply that their CON is no longer reflective of all of their original designated counties. Gentiva strongly urges that regulations be implemented that assure a fair and reasonable approach to CON modifications. The most important factor to Gentiva is assuring the quality and stability of homecare services to the patients and for the providers. If the Commission chooses to ultimately eliminate the CON, Gentiva would strongly urge that a fair but strong homecare licensure be implemented. Gentiva is currently represented on the Department of Health and Mental Hygiene's Task Force to review homecare licensure.

Comments from the **Maryland National Capital Homecare Association** (MNCHA) stated that the Association would like to ensure that the current CON is enforced, that there is a strong survey process, and that any additional regulations are fair and equitable to home health providers. This position has been formalized only after polling our membership and knowing that our members are equally divided on whether to support or oppose a CON requirement within the State of Maryland. As a result, the Association must remain neutral on this particular point. The MNCHA members, however, strongly agree that if the CON is maintained it is very important that the CON be enforced by state officials and that consistent surveys are undertaken to ensure compliance with the CON regulations. Another key aspect is in assuring that any new CON regulations are fair and reasonable. In October 2003, there were new regulations that impacted CON providers who had been grandfathered into the system. The regulations also stated that acquired agencies could only provide services in counties listed by the former provider during the fiscal year 2001. These types of regulatory modifications slowly erode the integrity of the originally authorized CON. On the issue of enforcement, MNCHA members report that agencies are entering counties where they currently do not have jurisdiction to provide services. It is therefore critically important that there be enforcement of the CON. That enforcement should include new agencies entering into the market as well as current agencies with their designated areas. Finally, MNCHA members strongly believe that agencies should be surveyed on a consistent basis to verify compliance with the CON. The surveys should re-enforce that agencies are properly using their CON. MNCHAs members are especially interested in assuring stability of providers within the market. This permits patients, physicians, payers, and state officials to know that agencies and know their services. Along with stability, it is important that the quality of care be exceptional for the health care services being

delivered in the patient's home. We, therefore, hope that as the Task Force on CON considers modifications or changes to the CON you will keep these points in mind.

Patti Maguire, Branch Administrator of **Personal Touch Home Care of Baltimore**, commented that while she believes in free enterprise and that competition makes products better, the home health field, particularly in Maryland, is not your typical free enterprise. According to Maguire, the need for home care nurses and therapists is critical. There is not an abundance of them. The importance of quality and integrity in this field is beyond that of the normal business. There is a very finite number of providers regardless of how many companies that are employing them. Therefore, Maguire stated that she did not believe that there exists the need for more competition that might make other "products" better or more affordable. This product is only going to be as good as the providers, and compliance and integrity of the companies they work for. The affordability is more in control of government and legislators than the individual company. We do not need more CONs; we need more therapists. This is not Vermont which is monopolized by one agency. Ms Maguire noted that there are fifty plus companies with CONs in Maryland. That provides more than enough choice for providers and patients. It seems ludicrous to increase the number of choices for a patient if you can't promise those patients that the agencies will all be subject to the same controls and measures so that they can be guaranteed the same quality of care regardless of provider.....If you do in fact open the program up, Ms. Maguire noted that all of the agencies would have to at least be JCAHO or CHAP accredited to protect those people we are in business to service.

Comments from **Andrew L. Solberg** supported eliminating CON for home care services. According to Solberg, health care planners cannot project the need for a specific number of home care agencies when there is no limiting "bricks and mortar" that help define capacity. The capacity of any home care agency is only limited by available nursing staff or volunteers it can recruit. In addition, home care also only represents one of at least three providers in its field. The Commission does not regulate Residential Service Agencies or Nurse Registries. Therefore, it cannot truly limit capacity. Over the years, the CON regulation has served only to impose a moratorium on new home care agencies. Continued regulation of home care has survived because the industry is split on the issue and, therefore, has opted for the comfortable inertia of protected franchises. It also has had the political power to stop legislation proposing deregulation. The Commission should consider why it regulated home care and continue to regulate it only if it can demonstrate that it can genuinely hold down costs or have some other demonstrable benefit. It should not regulate it if it will do what the Office of Health Care quality already does in licensure. If the Commission continues to regulate home care, it should recognize that it is doing so for political reasons, and not include a methodology projected need in the State Health Plan.

The **Southern Maryland Hospital Center** stated that certain services which are now regulated by CON could be better regulated by the marketplace. One example is home health and hospice services, which do not require large capital expenditures and whose costs are well contained by third-party reimbursement. SMHC is itself a provider

of home health services via its affiliate, Southern Maryland Home Health Services, Inc. but it believes that protectionism is not a sufficient justification for CON regulation.

Background

•Overview of Home Health Agency Services

In Maryland, there are various types of home care services provided to ill persons in their own place of residence. The range of home care services includes, but is not limited to, home health agencies (HHAs), residential service agencies (RSAs), nursing staff agencies and nursing referral service agencies.

Licensed and Medicare-certified **HHAs** (COMAR 10.07.10) must provide at least three skilled services: skilled nursing services, home health aide services; and at least one other service (Physical Therapy, Occupational Therapy, Speech Therapy, medical social services). Medicare's Condition of Participation (COP) must be met, including reporting the Outcome and Assessment Information Set (OASIS). OHCQ acts as Medicare's agent, surveying HHAs with respect to their compliance with Medicare's COP. Investigations of quality of care complaints usually require on-site visit by OHCQ. Majority of HHAs in Maryland are surveyed on-site annually.

Licensed **RSAs** (COMAR 10.07.05) may provide one or two of the three skilled services, or three or more services, as long as they do not provide the same level of services as that of a HHA. Also includes providers of invasive medical equipment and services, and of durable medical equipment (DME). Only licensed, may not receive Medicare reimbursement. RSAs are not surveyed on-site prior to licensing, and do not require a CON.

Nurse staffing agencies' regulatory oversight was transferred from the authority of the State Board of Nursing to the Office of Health Care Quality effective January 1, 2001. (HB 626 passed, and COMAR 10.07.03 has been recently resubmitted.) The new law requires nursing staff agencies to be licensed, with annual renewals, and may only provide nursing staff to health facilities licensed in Maryland (not in a private residence).

Nursing referral service agencies formerly regulated as "nurse registries" by the State's Department of Labor, Licensing, and Regulation (DLLR), through the Employment Agency Act. SB 550, an emergency bill passed during the 2004 Maryland General Assembly, transferred regulatory authority to the Office of Health Care Quality, requiring these entities to be licensed and renewed on an annual basis (COMAR 10.07.07 currently proposed).

Maryland statute requires CON review and approval for only one of these entities: home health agencies. Only HHAs must obtain a CON in order to seek Maryland licensure and certification for Medicare reimbursement.

Statewide, 51 home health agencies (HHAs) were licensed to serve Maryland jurisdictions in Fiscal Year 2003. Of these, two agencies (Kelly Home Care Services, and Home Health Connection) did not have Medicare certification. Seven of the remaining 49 Medicare-certified HHAs had a bifurcated license to operate non-Medicare or private entities. Every jurisdiction in Maryland has at least one home health agency serving its residents.

Two-thirds of Maryland HHAs are freestanding (34 agencies or 66.7%). The remaining one-third are composed of: hospital-based (9), HMO-based (4), County Health Departments (2), nursing home-based (1) and CCRC-based (1) agencies. With regard to ownership structure of HHAs: almost one-half of all agencies are private for-profit (25 agencies), while a little less than half (24 agencies or 47.1%) are private not-for-profit; and two agencies are government operated.

•Certificate of Need Coverage of Home Health Agency Services

Under Health-General Article §19-120, home health agency programs are defined as one of the categories of health services regulated under the Maryland CON program, as are hospice programs. Data collected by the American Health Planning Association on state CON programs indicates that 18 of the 37 programs nationwide regulate home health agency services.¹ Two (Washington, D.C. and West Virginia) of the five states adjacent to Maryland include the review of home health agencies under their CON programs.

¹ American Health Planning Association, *National Directory of Health Planning, Policy and Regulatory Agencies*, April 2003, p. 79.

Summary of Positions in Support of Alternative Regulatory Strategies

| | Deregulate from CON Review | Maintain Existing CON Review |
|----------------|--|---|
| Need | <ul style="list-style-type: none"> ● CON requirement for HHAs does not regulate full spectrum of home health delivery; RSAs, NSAs and NRSAs provide subsets of home care services not regulated by CON ● HHAs can expand capacity on an unregulated basis by adding staff. This largely eliminates potential for determining that new agencies are needed, biasing the regulatory process in favor of existing HHA. ● Limited scope of HHA CON regulation skews analysis of population use of HHA services. Volume of care provided by non-HHA entities is unknown. | <ul style="list-style-type: none"> ● Some states have seen unregulated market entry (except for licensure and Medicare certification) leading to proliferation of agencies and destabilization of service delivery for some period of time; longer-term shake out may result in consolidation of industry into fewer, larger agencies. |
| Access | <ul style="list-style-type: none"> ● Enforcement of authorized service areas for HHAs is difficult due to home-based nature of service delivery and reliance on self-reporting of data used in monitoring. | <ul style="list-style-type: none"> ● No indication that Marylanders lack access to HHA level of care; all jurisdictions served by at least one general HHA. |
| Cost | <ul style="list-style-type: none"> ● Charges for HHA services largely set by Medicare PPS, and their use constrained by other Medicare-mandated requirements, monitored by OASIS data reporting system. ● Limited scope of HHA CON limits control of cost; no impact on use of non-regulated HHA services. | <ul style="list-style-type: none"> ● Presence of more Medicare-certified HHAs might induce more referrals, and higher utilization, and consequently higher costs, than if number of agencies remains limited, and tied to projected need. ● Adding more agencies would increase competition for scarce staffing resources and unnecessary costs to the system |
| Quality | <ul style="list-style-type: none"> ● Principal indicators of quality of care (including initial and subsequent surveys by OHCQ, complaint investigation, accreditation, staff background checks, medical records review) are all required by Medicare as Conditions of Participation. OHCQ establishes compliance with these indicators as a condition of approving an agency's Medicare certification, and enforces compliance on a continuing basis. | <ul style="list-style-type: none"> ● CON review provides an initial, threshold review to determine whether a prospective HHA has financial resources, clinical sophistication, and information systems capability to obtain Medicare certification once licensed, thereby preventing marginal providers from entering market. |